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In the Supreme Court of the United States

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JON M. LIPSHULTZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel

JAN TIERNEY
HOWARD HOFFMAN
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, in promulgating a final rule respecting implementation of a National Ambient Air Quality Standard under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, reasonably determined that it may consider the cost-effectiveness of available pollution controls as a factor in identifying "upwind" State air pollution emissions that "contribute significantly" to nonattainment of the standard in "downwind" States.

2. Whether the court of appeals properly determined that the Environmental Protection Agency's authority under the relevant provisions of the Clean Air Act is sufficiently defined to satisfy the nondelegation doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 213 F.3d 663.

[1] This brief responds to three petitions for certiorari filed in this case: (1) *Appalachian Power Co.* v. *EPA*, No. 00-445 (filed Sept. 20, 2000) (APC Pet.); *Michigan* v. *EPA*, No. 00-632 (filed Oct.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. Petitions for rehearing were denied on June 22, 2000 (Pet. App. 62a-65a). The petition in No. 00-445 was filed on September 20, 2000. The Chief Justice extended the time for the States to file their petitions for a writ of certiorari to and including October 20, 2000, and the petitions in Nos. 00-632 and 00-633 were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* The CAA, among other things, directs EPA to develop National Ambient Air Quality Standards (NAAQS) and encourages States to implement the NAAQS through State Implementation Plans (SIPs). 42 U.S.C. 7410. EPA promulgated a rule, known as the "NOx SIP Call," that required the SIPs of 22 States and the District of Columbia to be revised to mitigate the interstate transportation of ozone. See 63 Fed. Reg. 57,356 (1998). Numerous petitioners challenged EPA's rule through consolidated petitions for review, and the court of appeals granted the petition in part, but largely rejected petitioners' objections to the rule. See Pet. App. 1a-61a.

1. The NOx SIP Call requires certain States (in order for their SIPs to remain acceptable under the Act) to develop plans to reduce emissions of ozone

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20, 2000) (Michigan Pet.); and *Ohio & Indiana* v. *EPA*, No. 00-633 (filed Oct. 20, 2000) (Ohio Pet.). For convenience, all citations to "Pet. App." refer to APC's petition appendix.

precursor air pollutants that contribute significantly to nonattainment of the NAAQS for ozone in "downwind" States. See generally 63 Fed. Reg. at 57,356. Ground-level ozone, which causes adverse health effects, is created from the chemical reactions of precursor pollutants in sunlight. *Id.* at 57,359. For nearly two decades, scientists have accumulated evidence that the wind-borne movement of nitrogen oxides (NOx) and other ozone precursors, often over long distances, contributes to serious downwind ozone problems, most notably in many of the major eastern urban centers. *Ibid.* The NOx SIP Call represents the culmination of a multi-year effort by Congress, EPA, and the States to develop solutions to that chronic interstate ozone pollution problem. See Pet. App. 8a-12a.

2. The CAA makes "the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). EPA is authorized to set NAAQS for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7409. EPA has established NAAQS for several pollutants, including ozone. 40 C.F.R. 50.9, 50.10. Once EPA promulgates a NAAQS, each State's SIP must provide for its implementation, maintenance and enforcement. 42 U.S.C. 7410(a). If the Administrator of EPA finds that an approved SIP is "substantially inadequate" to attain or maintain the NAAQS, mitigate adequately "interstate pollutant transport," or otherwise comply with the CAA, she is authorized to "require the State to revise the plan as necessary to correct such inadequacies" (*i.e.*, issue a "SIP Call"). 42 U.S.C. 7410(k)(5). Section 110(a)(2)(D) of the CAA, 42 U.S.C. 7410(a)(2)(D), sometimes referred to as the "good neighbor" provision, requires that all SIPs, *inter alia*, prohibit emissions of air pollutants

in amounts that would "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any * * * [NAAQS]."

3. On November 7, 1997, EPA issued a notice of proposed rulemaking for the NOx SIP Call, finding that 22 States and the District of Columbia (for convenience, the "23 States") significantly contribute to nonattainment of the ozone standard in downwind areas within the meaning of the CAA's good neighbor provision. 62 Fed. Reg. 60,318, 60,320 (1997).[2] At the same time, EPA proposed to require each of the 23 States to revise its SIP to demonstrate that total emissions, within each State, of NOx—the most significant ozone precursor responsible for ozone transported to other States—would be reduced by the amounts determined to be significant and, therefore, would not exceed an assigned NOx emissions "budget" established by EPA. *Ibid.* EPA published the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. Like the proposal, the final rule determined that the 23 States contribute significantly to downwind ozone nonattainment and required each of those States to submit SIP revisions containing control measures sufficient to meet the State's NOx budget. 40 C.F.R. 51.121(e)(1).

4. The final rule was premised, first and foremost, on state-of-the-art computer modeling of air quality, showing which upwind States were, in fact, substantial enough contributors to nonattainment of the "1-hour"

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[2] The 23 States were Alabama, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. 62 Fed. Reg. at 60,320.

ozone standard in downwind areas to warrant inclusion in the SIP Call.[3] For the proposal, EPA relied heavily on modeling performed between 1995 and 1997 by the Ozone Transport Assessment Group (OTAG), a work-group with representatives from States, industry, environmental organizations, and EPA. See Pet. App. 12a-13a. In response to comments arguing that the OTAG modeling utilized for the proposal was not specific enough, EPA conducted additional, state-specific air-quality modeling using two different modeling techniques. *Id.* at 13a. From that modeling, EPA compiled detailed data summaries showing the magnitude, frequency, and relative amount of each upwind State's emissions contributions to each downwind nonattainment problem being studied. *Id.* at 16a. That additional air quality analysis, fully documented in the record for the final rule, confirmed EPA's proposed "significant contribution" finding as to the 23 States. *Id.* at 13a; 63 Fed. Reg. at 57,384. As the court of appeals correctly noted, in the course of the present litigation, "no one quarrel[ed] either with [EPA's] use of multiple measures, or with the way it drew the line at this stage." Pet. App. 16a.

5. EPA then examined the cost-effectiveness of available emissions controls in each of the 23 upwind

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[3] In the final rule, EPA also independently analyzed the need for the SIP Call under an "8-hour" ozone standard that EPA issued in 1997. See generally Pet. App. 6a-7a. However, in light of the ongoing challenge to the 8-hour ozone standard in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, reh'g granted in part and denied in part, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003, 2193 (2000) (*ATA*), EPA stayed the findings for the SIP Call under the 8-hour standard, and the court of appeals accordingly limited its review to the support for the SIP Call under the 1-hour standard. Pet. App. 7a-8a.

States as part of its analysis in determining the amount of the State's emissions that were considered to "contribute significantly" to downwind nonattainment, as well as the corresponding emission reductions that were needed to eliminate the significant contribution. The remaining emissions became each of those States' "NOx budgets," *i.e.*, the maximum amount of NOx emissions expected after the States implement controls necessary to eliminate the "significantly contributing" emissions. Pet. App. 16a-17a. In effect, EPA set each State's NOx budget to reflect the amount of "highly cost-effective" NOx emissions reductions EPA believed would be available in that State. *Id.* at 17a; 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. For purposes of that analysis, which included review of extensive emissions control data, EPA determined that "highly cost-effective" NOx emissions reductions are those that cost no more than $2,000 per ton of NOx reduced. Pet. App. 17a. EPA emphasized, however, that, in developing SIP revisions to meet the NOx budgets, States would be free to rely on any NOx emission control measures they deemed appropriate, whether or not they were the same controls assumed by EPA in developing the budgets. *Id.* at 42a; 63 Fed. Reg. at 57,369-57,370, 57,378.

EPA tested the efficacy of the proposed NOx emissions budgets through further rounds of air quality modeling. First, it conducted additional computer modeling to ensure that the budgets would produce appropriate downwind air quality improvements. See 63 Fed. Reg. at 57,379. That modeling confirmed that the required reductions would, in fact, allow downwind ozone nonattainment areas to make "appreciable progress towards attainment" and would not result in any instances of "overkill," *i.e.*, upwind emissions reductions

that "are more than necessary to ameliorate downwind nonattainment in every downwind area affected by that upwind State." *Ibid.* EPA also compared the air quality and cost impacts of its proposed approach to alternative approaches premised, for example, on "varying levels of controls in different parts of the 23 jurisdictions." *Id.* at 57,423. EPA concluded, however, that none of those alternatives would "provide either a significant improvement in air quality or a substantial reduction in cost." Pet. App. 26a (quoting 63 Fed. Reg. at 57,423). The court of appeals noted that petitioners "offer[ed] no material critique of EPA's methodology in reaching this answer." Pet. App. 26a.

6. Various States and industry groups challenged the NOx SIP Call through consolidated petitions for review in the court of appeals. Other States, industry groups, and environmental groups intervened in support of the rule. The petitions raised myriad issues, including the two issues that provide the basis for the petitions for writ of certiorari: (1) whether cost-effectiveness of emissions controls may be considered in determining what level of emissions contributions are "significant"; and (2) whether the CAA or EPA's interpretations of its provisions are so undefined as to violate the nondelegation doctrine. The court denied all of the petitions for review on those and other major issues. Pet. App. 1a-56a. It vacated, however, certain relatively minor aspects of the rule, which are not at issue here.[4] Judge Sentelle dissented. He concluded

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[4] On the basis of certain discrete record issues, the court of appeals vacated the SIP Call as it applied to Wisconsin, Missouri, and Georgia. The court also remanded the rule for EPA to reconsider issues respecting the definition of an electric generating unit and a change in the control level assumed for large stationary internal combustion engines. Pet. App. 56a.

that the relevant provisions of the CAA do not allow EPA to consider cost of controls at all, and he would have vacated the entire rule on that basis. *Id.* at 57a-61a. Petitioners sought rehearing and rehearing en banc, primarily on the grounds articulated in the dissent, but the court of appeals denied those petitions. *Id.* at 62a-65a. Judge Sentelle would have granted the petitions. *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA may consider the cost-effectiveness of pollution controls in determining which emissions contribute significantly to nonattainment of the ozone standard in downwind areas. That statutory ruling is correct, does not conflict with any decision of this Court or any other court of appeals, and accordingly does not warrant review by this Court. The court of appeals also was correct in holding that neither the relevant provisions of the CAA nor EPA's actions violate the nondelegation doctrine. While the court of appeals' analysis was premised, in part, on a decision of that court that the federal government has challenged in *Browner* v. *American Trucking Associations* (*ATA*), No. 99-1257 (argued Nov. 7, 2000), the judgment reached by the court of appeals is correct and does not warrant further review, regardless of this Court's decision in *ATA*.[5]

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[5] APC and Ohio suggest that the Court may wish to defer action on their petitions pending a decision in *ATA*. APC Pet. i n.*; Ohio Pet. 16 n.8. That action is not warranted as to either the nondelegation issue or the cost issue in this case. The court of appeals adopted a novel nondelegation standard in *ATA*, *supra*, at 1027, and the federal government has challenged that ruling in *Browner* v. *ATA*, No. 99-1257. The court of appeals in this case, however, has rejected petitioners' nondelegation argument, even

1. The NOx SIP Call is EPA's effort to implement the CAA provisions that address an interstate problem —the accumulation of ozone, which, for example, blankets the northeastern United States on warm summer days as a result of air pollution emitted by numerous sources in nearly two dozen States east of the Mississippi River. EPA identified, through sophisticated air quality modeling, those States that contribute to that problem, and it then identified as "significant contributions" those emissions in excess of what the emission levels would be if all of the contributing States imposed the same level of highly cost-effective emission controls on their sources.

As we have explained in *ATA* v. *Browner*, No. 99-1426, the Clean Air Act prohibits consideration of the projected cost of pollution controls when establishing NAAQS, but generally allows those costs to be considered at the implementation stage. See Br. for Fed. Resp'ts at 5-7, 17-31, 45-47, *ATA* v. *Browner*, *supra*. In accordance with that overall statutory structure, EPA has reasonably construed the relevant provisions of the Act—Section 110(a)(2)(D) and

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under its *ATA* ruling. Pet. App. 26a-28a. The relevant provisions of the CAA would satisfy nondelegation requirements under any plausible standard. See pp. 20-22, *infra*. The cross-petitioners in *ATA* v. *Browner*, No. 99-1426, contend that the CAA requires EPA to consider the costs of pollution control when setting NAAQS. Petitioners in this case contend, however, that the CAA precludes EPA from considering those costs when determining how to implement the CAA's trans-boundary pollution provisions set out in Section 110(a)(2)(D), 42 U.S.C. 7410(a)(2)(D). If the cross-petitioners in *ATA* prevail on their cost issue, that result would weaken, rather than bolster, petitioners' cost argument in this case. And if the *ATA* cross-petitioners do not prevail on their cost issue, that result would preserve the state of the law that provided the basis for the court of appeals' decision in this case.

(k)(5)—to allow consideration of cost-effectiveness of controls in determining which contributions to the interstate ozone problem are "significant[]" for purposes of the NOx SIP Call. See 42 U.S.C. 7410(a)(2)(D) and (k)(5). The court of appeals properly upheld EPA's determination. Petitioners' challenges rely heavily on mistaken characterizations of the manner in which EPA considered costs in the rulemaking. Because the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals, petitioners' challenge to EPA's construction of the relevant provisions of the CAA presents no issue warranting this Court's review.

a. The petitions for writ of certiorari rest largely on the mistaken assertion that the NOx SIP Call "rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute 'significantly' to another state's ozone nonattainment air quality." APC Pet. 14; see also, *e.g.*, Michigan Pet. 12; Ohio Pet. 5-6. To the contrary, EPA focused on air quality—not cost—as the principal basis for determining which States have total emissions with sufficient impacts on downwind ozone nonattainment to warrant inclusion in the SIP Call. EPA's determinations were premised on state-specific, multi-dimensional, air-quality modeling analyses that were fully documented in the administrative record and mostly unchallenged in this case. See pp. 4-7, *supra*; Pet. App. 12a-14a, 16a; 63 Fed. Reg. at 57,384, 57,387-57,398.[6]

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[6] That modeling allowed EPA to make careful, air-quality-based distinctions among all upwind States whose emissions could potentially impact a particular downwind area. In many instances, EPA determined that the ambient impacts downwind from a particular upwind State's emissions were so small as to not be "significant" with regard to particular downwind nonattainment pro-

As the court of appeals correctly recognized, only after those determinations were made did EPA examine the amount of highly cost-effective NOx emissions reductions available to develop the NOx budgets. Pet. App. 16a-17a; see also 63 Fed. Reg. at 57,377-57,378. That analysis was the principal factor only in determining the *subset* of each relevant upwind State's total NOx emissions that should be eliminated as the "significant contribution" to downwind nonattainment. See Pet. App. 16a-17a. Furthermore, after EPA derived the proposed NOx budgets, EPA conducted *additional* air quality modeling, again fully documented in the record and mostly unchallenged in this case. The modeling showed that the required emissions reductions, as a whole, would have an "appreciable impact" on downwind nonattainment and that there is no instance where a required upwind emission reduction is "more than necessary to ameliorate downwind nonattainment." 63 Fed. Reg. at 57,403, 57,446-57,447.[7]

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blems. See, *e.g.*, 63 Fed. Reg. at 57,392-57,394 (comparing modeling data for upwind States that were, and were not, found to contribute "significantly" to New York City's nonattainment problem). The court of appeals pointed out that petitioners "really [did] nothing more than quibble" with EPA's modeling, and "no one quarrel[ed]" with the overall analytical approach used by EPA to interpret the data and determine significant contributions of upwind States. Pet. App. 13a, 16a. One South Carolina utility company did object to EPA's findings respecting air quality modeling for the State of South Carolina, but the court's specific rejection of the utility's arguments illustrates the soundness of the air quality modeling that EPA performed at that stage of its analysis. See *id.* at 36a-37a.

[7] EPA determined that, even after implementation of the SIP Call, some "residual nonattainment" would likely persist for at least one downwind area linked to each upwind State. See 63 Fed. Reg. at 57,404, 57,447. Thus, if anything, EPA erred on the side of

Accordingly, and contrary to petitioners' suggestions, the question presented in this case is *not* whether EPA may base a SIP Call exclusively (or primarily) on cost, rather than air quality, considerations. Rather, the question is whether EPA may use cost analyses to help develop a fair, practical, and effective regulatory approach supported—and bounded—by extensive and mostly undisputed air quality modeling. The court of appeals correctly answered that question.

b. The court of appeals ruled, on the basis of the CAA and its legislative history, that EPA reasonably construed Section 110(a)(2)(D). See Pet. App. 15a-25a. EPA concluded that, when determining the amount of each upwind State's emissions that "contribute significantly to nonattainment" in downwind States (42 U.S.C. 7410(a)(2)(D)), EPA could consider the level of emission reduction that could be achieved in the upwind States through cost-effective control measures. The CAA neither requires nor prohibits EPA's consideration of that sensible benchmark as part of the process for solving a complex, and highly fact intensive, interstate pollution problem. As the court of appeals properly recognized, EPA's approach represents a reasonable construction of its obligations under the relevant provisions of the CAA. See *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984).[8]

In upholding EPA's construction of the statute, the court of appeals correctly observed that "[t]he term

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under-control rather than over-control. EPA stated that it would continue to monitor the progress made on ozone nonattainment and, if necessary, "may establish new budget levels and allocation mechanisms for the post-2007 timeframe." 63 Fed. Reg. at 57,428.

[8] The court of appeals correctly noted that no party argued (and the court did not hold) that EPA was *required* to consider costs under Section 110(a)(2)(D). Pet. App. 17a-18a, 22a.

'significant' does not in itself convey a thought that significance should be measured in only one dimension." Pet. App. 21a.[9] The court explained that EPA is justified in construing the term "significant" to allow for consideration of emission control costs when making regulatory decisions in the context presented here. See *id.* at 21a-25a. Furthermore, the CAA's legislative history indicates that, at least since 1977, Congress has anticipated the need to take account of pollution control costs and the economic incentives of the States that contribute to, or are affected by, interstate pollution.[10] EPA's approach fulfills Congress's objective to ameliorate the impact of interstate pollutant transport and to do so in a way that equitably distributes the burdens borne by all the States that are contributors to this complex, regional problem.

c. Petitioners are mistaken in suggesting that EPA's approach conflicts with other decisions of the courts of appeals. See APC Pet. 17-19; Michigan Pet. 11-12. They essentially argue, based on Judge Sentelle's dissent, that Congress clearly intended to

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[9] At least one of the petitioners appears to agree with this statement. See Ohio Pet. 10 ("It is true, as the court of appeals noted, that the term 'significant' is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring 'contributions' that require a regulatory response.").

[10] See S. Rep. No. 95-127, 95th Cong., 1st Sess. 41-42 (1977) (noting the need to address the "serious inequities among several States, where one State may have more stringent [SIP] requirements than another State," and to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State"); see also *id.* at 42 (noting that "plants in States with more stringent control requirements" are subject to a "distinct economic and competitive disadvantage").

preclude consideration of costs under Section 110(a)(2)(D). See Pet. App. 59a-60a. The court of appeals correctly rejected petitioners' contention. Judge Sentelle relied on cases such as *American Petroleum Institute* v. *EPA*, 52 F.3d 1113 (D.C. Cir. 1995), and *Ethyl Corp.* v. *EPA*, 51 F.3d 1053 (D.C. Cir. 1995), which recognize that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors.[11]

EPA did not violate that principle. EPA properly focused the NOx SIP Call on the precise air quality issue that is the subject of Section 110(a)(2)(D)—the elimination of emissions that "contribute significantly" to nonattainment of the NAAQS in downwind States. EPA merely considered emission control costs as part of its analysis. This case therefore does not pose the question whether EPA can take regulatory action premised on a goal or factor different from that set forth in the relevant statutory provision, nor whether EPA has taken action exceeding its statutory authority. See APC Pet. 16 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Rather, the question here is simply whether EPA may consider costs as part of an effort to give meaningful effect to an undefined term in the relevant provision—in this case, the phrase "contri-

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[11] See *American Petroleum Inst.*, 52 F.3d at 1119 (finding that the relevant statutory provisions unambiguously required that regulation be "directed toward the reduction of VOCs and toxics emissions"); *Ethyl Corp.*, 51 F.3d at 1058 (finding that the relevant statutory provisions unambiguously confined fuel additive waiver determination to effects of additive on emission control devices).

bute significantly to nonattainment." See Pet. App. 21a ("The fundamental dispute is over the clarity of the phrase 'contribute significantly.'"). As the court of appeals correctly recognized, that court's previous decisions support EPA's determination. See *id.* at 21a-24a.

The court of appeals appropriately focused on cases such as *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). See Pet. App. 23a-24a. In *NRDC*, the court considered challenges to EPA's use of emission control costs in setting an emission standard for vinyl chloride, which the CAA regulates as a "hazardous" air pollutant. See CAA § 112, 42 U.S.C. 7412 (1994 & Supp. IV 1998). Section 112 provided, at that time, that hazardous pollutant emission standards were to be set "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health." 824 F.2d at 1148. The court of appeals ruled that EPA may consider emission control costs in making that determination, explaining that "the phrase 'to protect the public health' evinces an intent to make health the primary consideration," but that nothing in the statute or its legislative history indicated any congressional intent to preclude consideration of costs. *Id.* at 1155.[12]

The court of appeals in this case noted that it has routinely applied its approach in *NRDC* to determine when an agency may consider costs when making regu-

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[12] The court of appeals ultimately remanded EPA's vinyl chloride rule because the court found that EPA had "*substituted* technological feasibility for health as the primary consideration." 824 F.2d at 1164 (emphasis added); see also APC Pet. 7 (discussing that aspect of the court's decision). That concern, however, is not present in this case. EPA's consideration of costs was only one component of its overall effort to implement Section 110(a)(2)(D)'s air quality goals.

latory decisions. See Pet. App. 22a-23a.[13] Petitioners have failed to identify, either here or in the proceedings below, any persuasive evidence that Congress intended to preclude EPA from considering costs under Section 110(a)(2)(D). See *id.* at 24a-25a.[14]

d. There is no merit to the contentions of Michigan and Ohio that EPA's regulatory approach represents an improper intrusion on state sovereignty. See Ohio Pet. 9-16; Michigan Pet. 14-19, 22-28. While the States' arguments are somewhat ambiguous, they seem to focus on Section 110(k)(5)'s direction that EPA shall call for revision of a State's SIP "as necessary to correct * * * inadequacies." Ohio Pet. 11; Michigan Pet. 24-25. In petitioners' view, EPA's analytical approach was so blunt that it required some States to reduce emissions

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[13] See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622-624 (1998) (although improvement in air quality is the "overall goal" of the CAA gasoline anti-dumping provisions, EPA permissibly considered economic factors since nothing "in the text or structure" of the statute precluded such consideration), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (FAA properly considered economic impacts on air tour industry as factor in developing regulation under statute providing for "substantial restoration of natural quiet" in Grand Canyon National Park), cert. denied, 526 U.S. 1158 (1999).

[14] In the court of appeals proceedings, petitioners advanced conflicting theories of the extent to which Section 110(a)(2)(D) allows consideration of costs. See Pet. App. 17a-20a. That divergence continues here. Compare APC Pet. 16 (consideration of costs precluded), and Michigan Pet. 8 (same), with Ohio Pet. 15 (costs may be considered, but only as a "secondary consideration"). As the court of appeals aptly observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say there is 'clear congressional intent to preclude consideration of cost' under 110(a)(2)(D)." Pet. App. 20a (quoting *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc)).

more than "necessary," while other States are tasked with reducing emissions less than "necessary." Ohio Pet. 11-14; Michigan Pet. 25. Petitioners essentially contend that EPA erred by not tailoring state NOx budgets more precisely to the modeled impact of each State's emissions on downwind nonattainment areas.[15]

The court of appeals properly rejected the gist of that argument on the basis of the rulemaking record. See Pet. App. 25a-26a. The court observed that, before selecting a relatively uniform analytical approach to calculate each State's NOx budget, EPA also modeled approaches that introduced more regional variations, similar to the approaches that petitioners now suggest. *Ibid.* EPA found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost, and that "[t]he complaining states offer[ed] no material critique of EPA's methodology in reaching this answer." *Id.* at 26a. The court correctly recognized that any regulatory approach to an exceedingly complex interstate air pollution problem could be attacked as having some imprecision, particularly when viewed from a parochial perspective. EPA considered various approaches and reasonably selected one that struck an appropriate balance among the relevant technical considerations.

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[15] While petitioners presented similar factual arguments to the court of appeals, they were not presented in federalism terms. The States' federalism arguments below rested on a more sweeping assertion that EPA's decision to establish NOx budgets, in and of itself, inappropriately restricted the States' prerogatives to choose emission control strategies. Pet. App. 37a-43a. The court of appeals rejected that argument, and the States do not directly challenge that aspect of the court decision here.

See *ibid.*; see also, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[16]

e. There also is no merit to Michigan's argument that EPA's consideration of cost-effectiveness of emission controls in the NOx SIP Call conflicts with this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). See Michigan Pet. 14-19. Michigan contends that in *Union Electric*, the Court held that a SIP revision submitted under Section 110(a)(2), 42 U.S.C. 7410(a)(2), may be evaluated only on the basis of whether it meets the minimum conditions identified in subparagraphs (A) to (H) of that provision and that none of those minimum conditions includes consideration of economic or technological feasibility. See Michigan Pet. 15 (citing *Union Elec.*, 427 U.S. at 257).

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[16] The complexity of developing a more "variable" type of approach is apparent from the record. Each of the States subject to the SIP Call was found to contribute "significantly" to 1-hour ozone nonattainment in numerous (in some cases, as many as a dozen or more) downwind States, and many "upwind" States are themselves "downwind" receivers of pollution contributions from other States. See 63 Fed. Reg. at 57,394-57,395. Overall, EPA found that there were more than 150 significant upwind-to-downwind state pollution contribution linkages under the 1-hour ozone standard. See *ibid.* (Table II-5). Furthermore, the magnitude, frequency, and relative amount of the air pollution contributions underlying each of those linkages varies considerably. See, *e.g.*, *id.* at 57,396-57,398 (examples of modeling data for linkages). Petitioners do not identify any alternative approach from the administrative record that would adequately address all the complex dimensions of this regional problem. Instead, petitioners suggest that EPA's approach is imprecise based on selective comparisons that fail to grapple with the larger and more complex problems that EPA needed to address. See, *e.g.*, Ohio Pet. 12-13 (comparing Indiana/New York and Pennsylvania/New York linkages); Michigan Pet. 22-23 (same).

Michigan's understanding of *Union Electric* is incorrect.

The Court's *Union Electric* decision addressed a sulfur dioxide SIP submitted under the requirement of Section 110(a)(2)(A)(i), which provided, at that time, that each State must formulate a SIP to achieve the primary NAAQS "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." 427 U.S. at 249-251. The Court stated in broad terms that "Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP]." *Id.* at 256. But the Court also made clear that its holding concerning economic and technological feasibility was focused on the type of SIP revision at issue. *Id.* at 265 ("In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator *in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years.*") (emphasis added). *Union Electric* expressly recognized that consideration of "[e]conomic and technological factors" may be appropriate in circumstances other than those directly at issue in that case. *Id.* at 264-265 n.13. Michigan is accordingly mistaken in suggesting that *Union Electric* precludes EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D).[17]

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[17] Michigan's reliance on *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), is similarly misplaced. See Michigan Pet. 25. The *Train* decision—which held that certain amendments to SIPs should be treated as "revisions" and not as "postponement[s]" and, therefore, should be subject to more relaxed statutory requirements under the version of the CAA then in effect, 421 U.S. at 98-99—has no direct bearing on the issues presented here.

2. APC alone objects to the court of appeals' decision on nondelegation grounds. See APC Pet. 19-21. As APC recognizes, the court of appeals recently relied on the nondelegation doctrine to invalidate EPA's promulgation of revised ozone and particulate matter NAAQS. See *ATA*, *supra*. This Court has granted the federal government's petition for a writ of certiorari challenging the court of appeals' *ATA* decision. See *Browner* v. *ATA*, No. 00-1297. Regardless of the outcome of that case, the court of appeals was correct in ruling that Section 110(a)(2)(D) does not violate the nondelegation doctrine.

The court of appeals concluded that its *ATA* ruling, which requires agencies to identify an "intelligible principle" when exercising discretion under broad statutory grants, applies only to agency action that has nationwide effect. See Pet. App. 26a-27a. The court rejected petitioners' nondelegation challenge primarily on the ground that EPA's interpretation of Section 110(a)(2)(D) has "confined the statute to a modest role." *Id.* at 28a. The Court need not rely on that particular distinction, however, because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine. This Court's decisions recognize that the nondelegation doctrine is satisfied if a statutory grant of authority itself sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." See *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). Section 110(a)(2)(D) plainly satisfies that standard. It quite specifically directs EPA to ensure that each SIP contains adequate provisions to prevent emission of air pollutants in amounts that, inter alia, "contribute significantly to nonattainment in, or inter-

fere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D). Section 110(a)(2)(D) simply confers the normal quantum of discretion that agencies routinely exercise in administering statutory programs. See, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 843-845.

APC's further suggestion that the Court should alternatively find "EPA's selection of its $2000-per-ton cut-off point" to be "arbitrary and capricious" is also without merit. APC Pet. 20-21. APC did not make that argument in the court of appeals and has not even identified it as a question presented in its petition for a writ of certiorari. See APC Pet. i. APC's argument rests on an out-of-context partial quotation from the court of appeals' nondelegation ruling. The court stated that the $2000-per-ton threshold, viewed from the perspective of *ATA*'s *nondelegation* ruling, is a "radically incomplete line-drawing device." Pet. App. 26a; APC Pet. 20. The court nevertheless expressly acknowledged the extensive *factual* support for the $2000-per-ton threshold in the administrative record. Pet. App. 27a.[18]

Whatever the merits of the court of appeals' nondelegation ruling in *ATA*, that decision does not alter the established standard for determining whether an agency's action is arbitrary or capricious. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (a court is limited to examining

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[18] See Pet. App. 27a ("EPA indicates that it rested the $2000/ton figure on 'NOx emissions controls that are available and of comparable cost to other recently undertaken or planned NOx measures'") (quoting 63 Fed. Reg. at 57,400). EPA's determination was based on extensive analysis of emission control data that was fully documented in the rulemaking record. See 63 Fed. Reg. at 57,377-57,378, 57,399-57,403.

whether the agency's action "was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). EPA amply justified its choice of the $2000-per-ton threshold in the rulemaking proceeding. 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. Hence, even if APC had raised a challenge to EPA's selection of that threshold under the arbitrary or capricious standard in the court of appeals, the challenge would have failed. There is no reason for this Court to address, for the first time in this case, that entirely factbound question.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JON M. LIPSHULTZ
Attorney

GARY S. GUZY
General Counsel

JAN TIERNEY
HOWARD HOFFMAN
Attorneys
Environmental Protection Agency

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